



COMMONWEALTH of VIRGINIA
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MEMORANDUM

TO: BRIAN MCCORMICK
Regulatory Coordinator
Department of Medical Assistance Services

FROM: REATHA B. KAY
Special Counsel to DMAS

DATE: January 4, 2005

SUBJECT: Emergency Regulations concerning Elderly or Disabled with Consumer Direction Waiver (“ED-CD Waiver”)

I have reviewed the attached emergency regulations concerning the implementation of DMAS’s ED-CD Waiver and repeal of the regulations governing DMAS’s Elderly and Disabled Waiver and DMAS’s Consumer-Directed Personal Attendant Services Waiver.

Based on that review, it is this Office’s view that the Director, acting on behalf of the Board pursuant to Va. Code § 32.1-324, has the authority to promulgate these regulations, subject to compliance with the provisions of Article 2 of the Administrative Process Act and has not exceeded that authority.

The authority for this emergency action is found in Va. Code § 2.2-4011, which provides that emergency regulations are “[r]egulations that an agency finds are necessitated by an emergency situation.” The amendments to the regulations will enable the Director, in lieu of the Board of Medical Assistance Services, to comply with the 2003 Acts of Assembly, Chapter 460, which states “[t]hat, upon approval by the Centers for Medicare and Medicaid Services of any application for revision of the consumer-directed personal care services waiver or for any new waiver that may be submitted by the Department of Medical Assistance Services pursuant to this act, expedition implementation of any revised or new consumer-directed services shall be deemed to be an emergency situation pursuant to § 2.2-4002 of the Administrative Process Act; therefore, to meet this emergency situation, the Board shall promulgate emergency regulations to implement the provisions of this act.”

Accordingly, with the prior approval of the Governor, these regulations qualify for the “emergency” exemption from Article 2 requirements. Please be advised, however, that under Va. Code § 2.2-4011(A), the

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Department must state in writing the nature of and necessity for such emergency action, and this appears to have been accomplished in the "Agency Background Document." In addition, the regulations shall be effective for no more than twelve months from the emergency regulatory action on this subject matter. As the Department intends to continue regulating the subject matter governed by this emergency regulation beyond 12 months, it will be necessary to replace these emergency regulations with regulations duly promulgated under Article 2 of the APA. A Notice of Intended Regulatory Action relating to the proposed replacement regulations must be filed with the Registrar within 60 days of the effective date of the emergency regulations. The proposed replacement regulations must be filed with the Registrar within 180 days after the effective date of the emergency regulations.

If you have any questions or need any additional information, please feel free to call me at 371-8721.

cc: Kim F. Piner, Esquire

Attachment